'It's the political economy..!'
A moment of truth for the eurozone and the EU

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1. The elephant in the room

The *Weiss* ruling of the German Federal Constitutional Court (GFCC) has produced an avalanche of commentaries, and will likely be the source of a mountain of case notes and articles. Scholars and pundits have focused on the institutional aspects of the judgment, with two key themes emerging: authority and proportionality. The ruling is said to be an act of "rebellion" or of "resistance" (depending on the eye of beholder) against the authority of the European Court of Justice (ECJ). Or the ruling is said to be about the principle of proportionality, revealing partisans of two different blends of proportionality: Luxembourgeois and Karlsruheois. [1]

There is a fundamental reason to be deeply frustrated with this reaction: by focusing on authority and proportionality without any contextualisation, the elephant in the room is hidden, namely the fate of the EU's economic and monetary constitution.

Few if any commentators note that *Weiss* challenges an unconventional monetary policy tool, the Public Sector Purchase Programme (PSPP), with which the European Central Bank (ECB) has acquired bonds of a value of over 20% of the euro area's GDP.[2] This omission, however, makes it impossible to apprehend the constitutional implications of *Weiss*. The limits of law as a means of integration are thus overlooked. Or, to put it more bluntly, "It's the political economy, stupid"![3]

The lack of proper contextualisation is, moreover, likely to lead to distorted prognoses. *Weiss* is the latest stage in the longer socio-economic evolution of European integration, and of its crisis management since 2007. Key principles of the "Maastricht" Economic and Monetary Union (EMU), such as the independence of the central bank and the radical separation of the liabilities of national Treasuries, have been altered in practice and in law. Instead of engaging with this transformation, legal analyses, much as the rulings themselves, maintain the illusion that the Maastricht paradigm still holds, even if different courts and authors interpret it differently. Analysis comes hand in hand with "off the cuff" policy proposals to resolve the judicial conflict, disregarding the

[1] Judgment on C-493/17,*Weiss*, ECLI:EU:C:2018:1000; BVerfG, Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915.

[2] In October 2020, the reported value of assets purchased under the PSPP was of 2,295 billion Euros. See ECB, *consolidated financial statement of the Eurosystem as at 2 October 2020*, available at <https://www.ecb.europa.eu/press/pr/wfs/2020/html/ecb.fs201007.en.html>.

[3] Marco Dani, Joana Mendes, Agustín José Menendez, Michael Wilkinson, Harm Schepel, Edoardo Chiti, *At the End of the Law: A Moment of Truth for the eurozone and the EU, VerfBlog,* 2020/5/15.

complex legitimacy questions at play as well as the reality of German and European politics. Finally, hyperbole around the institutional tit-for-tat results in actually downplaying the transformative potential of the judicial saga. The conflict is turned into a courtroom drama, sustained by the simplistic expectation that the eurozone might escape from its present impasse by way of smart legal reasoning. Muddling through is likely to become a spent strategy in the near future.

In this article, we argue that the *Weiss* saga should be read through the lens of political economy. While we are highly critical of both courts, the conflict shows the fundamental dysfunctionality of EMU as currently configured. Muddling through is inflicting increasing damage on national democratic and social constitutions. If we want to avoid this, it is essential to create the time and space for democratic decision making and, preferably, engage in a comprehensive and radical amendment of the treaty framework.

We proceed by first setting the *Weiss* saga in its wider context, namely the protracted transformation of EMU over the last decade, a decade which has revealed the structural flaws in its design (part 2). We then briefly sketch the changing role of central banking, from a fixation on fighting inflation to a focus on combating deflation (part 3). This helps to explain the problematic character of the rulings of the GFCC and the ECJ and the commentaries they have provoked, illustrating a general failure to consider the *limits of law*. This is the result of clinging to different parts of the EMU wreckage, on the assumption that the current constitutional framework remains viable (part 4). Finally, we emphasise the transformative potential of the *Weiss* saga. The judicial conflict lays bare the unsustainability of the present arrangements; it reveals the need for either genuinely federal integration or coordinated dismantling of EMU. Yet it so far remains a missed opportunity, as highlighted by a comparison with Roosevelt's New Deal (part 5). The final section considers the recent fiscal measures taken under the pillars of 'Next Generation EU'. It concludes by arguing that, although not without some innovative features, this initiative sets a course that remains economically insufficient and democratically deficient (part 6).

2. Context: An asymmetric and precarious Economic and Monetary Union

The protracted financial, economic and fiscal crises Europe has experienced since 2007, now amplified by the COVID-19 pandemic, are an essential part of any sound analysis of *Weiss*. These challenges have found the EU as a whole, and the eurozone in particular, entangled in a set of highly problematic structures, decision-making procedures and substantive norms. Three elements relevant to our analysis deserve to be briefly sketched: the functional constitution and structural flaws of EMU (section i); EMU's problematic transformation through the management of the financial, economic and fiscal crises (section ii); and the further challenges for EMU created by the pandemic emergency, just weeks before the GFCC rendered its final judgment on *Weiss* (section iii).

i. Structural flaws: A monetary union ill-equipped to face crises

The original design of EMU was based on the assumption that the stability of the euro as a currency could be ensured without the support of common supranational institutions dealing with economic and fiscal policy, or what amounts to the same, that the euro could be the first modern money without a state.

What is perhaps less well-known is the fact that this asymmetric construction, combining a federalised and depoliticised monetary policy with a plurality of national fiscal policies, was the upshot of a particular constellation of interests and ideas. After the fall of the Berlin Wall, there was a strong political will to realise a monetary union, but no common political vision of how to govern it. There were federalists who favoured the transfer of tax powers to the EU, ordo-liberals who aspired to a process of gradual economic convergence leading to monetary union, and neoliberals who placed their faith in the logic of the market. These differences were overcome by an implicit agreement on the convenience and feasibility of a "modest" monetary policy, exclusively aimed at ensuring "price stability" and entrusted to a central bank insulated from democratic politics.[4] This agreement was reinforced by a widely shared culture of 'total optimism',[5] a utopian belief in permanent economic and financial growth, sustained by the expansion of business activities, market liberalisation and free circulation of capital. In this context, the single currency could be conceptualised as a politically neutral device, and could function as a means of placing external constraints on domestic mass politics.[6]

In reality, however EMU was a highly dysfunctional construction that would be prone to crises. Enduring structural differences between national socio-economic structures were bound to be ill-served by a single monetary policy likely to fit none. The almost unavoidable outcome was rigid constraints on the fiscal autonomy of Member States. As a monetary union without a political union, EMU lacked institutional structures and tools capable of reducing economic divergencies, not least through the redistribution of resources.[7] The asymmetric nature of EMU and the pulverisation of public power were at the root of the multidimensional European crisis – financial, fiscal, economic, institutional

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[4] See Amy Verdun, 'The Institutional Design of EMU: A Democratic Deficit?' (1998) 18:2 *Journal of Public Policy* 107 – 132. On the broader similarities between ordoliberalism and neoliberalism, see Michael A. Wilkinson, 'Authoritarian Liberalism: On the Common Critique of Ordoliberalism and Neoliberalism' (2019) 45:7-8 *Critical Sociology* 1023 – 1034.

[5] See Giandomenico Majone, *Rethinking the Union of Europe Post-Crisis: Has Integration Gone too Far?* (Oxford University Press, 2014) 58 – 87.

[6] See Kenneth Dyson and Kevin Featherstone, 'Italy and EMU as a *vincolo esterno*: Empowering the Technocrats, Transforming the State' (1996) 1:2 *South European Society and Politics* 272 – 299. Most revealing is Guido Carli, *Cinquant'anni di vita italiana*, Bari: Laterza, 1996.

[7] This constitutes a remarkable design flaw. The 1977 McDougall report expressly called for a sizeable "supranational" budget to stabilise the European economic area. Cf. 'Report of the Study Group on the Role of Public Finance in European Integration', available at <http://aei.pitt.edu/36433/1/Report.study.group.A13.pdf>.

and political[8] – which began in 2007 and whose deeply transformative effects on the EU continue to reverberate into the present.[9]

ii. Shoring up a dysfunctional EMU

The European response to the crisis has gradually transformed EMU by establishing a framework of financial assistance, conditionality, limitation of national fiscal sovereignty and unconventional monetary policy.

This development has been remarkable in many regards. An attempt to shore up EMU, it has been presented as necessary in order to attenuate the devastating impact of the crisis and keep the euro from unravelling. "Financial assistance" granted to states experiencing fiscal difficulties led to the creation of a European Monetary Fund of sorts, eventually consolidated into the European Stability Mechanism (ESM). These changes shattered the tight separation between national exchequers and curtailed national fiscal sovereignty, as loans were subject to strict conditionality (soon identified with "austerity" policies). The elaboration by the ECB of new instruments of monetary policy was a parallel and complementary development: the launch of Outright Monetary Transactions (OMT), although tied to the ESM and conditionality, represented a "de facto" move away from an exclusive focus on price stability and avoidance of inflation, at the very same time that the ECB became active in the policing of loan conditionality through its own participation in the "troika".[10]

This new framework, however, was highly problematic, not only from an economic, but also from a legal, democratic and social perspective. Austerity programs directly contributed to the eurozone's dismal performance and reinforced a structural divide between creditor and debtor countries. [11] The limitation of national fiscal sovereignty was not accompanied by the establishment of some form of supranational economic government, let alone by the provision of a genuine EU fiscal competence. The new economic governance, instead, was called to operate through rules-based mechanisms aimed at disciplining national policies. Recourse to instruments of unconventional monetary policy widened the ECB's mandate, on the basis of a loose and disputable interpretation of the relevant Treaty provisions. In the subsequent litigation in *Gauweiler*, both the ECJ and eventually the GFCC held that the OMT

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[8] Edoardo Chiti, Agustín Menéndez and Pedro Teixeira 'The European rescue of the European Union', in E Chiti, AJ Menéndez and PG Teixeira (eds), *The European Rescue of the European Union? The Existential Crisis of the European Political Project* (Arena Report No 3/12 and Recon Report N. 19, 2012) 391.

[9] For an overview, see the recent collection, Eva Nanopoulos and Fotis Vergis (eds.) *The Crisis Behind the EuroCrisis: On the Multi-Systemic Failure of the EU* (Cambridge University Press, 2019).

[10] A fact the Advocate General expressed concern about in C-62/14, *Gauweiler and Others*, EU:C:2015:7.

[11] Joseph E Stieglitz, *The Euro and its Threat to the Future of Europe* (Allen Lane, 2016) 63 ff. and 177 ff.; Mark Blyth, *Austerity: The History of a Dangerous Idea* (Oxford University Press, 2013); A. Mody, *Euro Tragedy: A Drama in Nine Acts (*Oxford University Press, 2018); Fernando Losada, 'A Europe of Creditors and Debtors: Three Orders of Debt Relations in European Integration', (2020) 58:4 *Journal of Common Market Studies*, 787-802.

program did not breach the prohibition on monetary financing of national budgets (Article 123 TFEU), provided that some "safeguards" were respected, preventing the ECB's operations on secondary bond markets from becoming the functional equivalent of direct purchases.[12] But a clear tension remained between the evolving mandate of the ECB and a rigid constitutional framework.

iii. When crises deepen: the COVID pandemic response

The pandemic emergency has created further challenges for EMU. The shock to supply and demand has called for massive public intervention aimed at strengthening public health care systems and counterbalancing the effects of lockdowns and persistent restrictions on economic activity. EU institutions have "suspended" the application of competition and fiscal rules that pre-empt public intervention in the economy. In particular, the rules governing state aids have been virtually put on hold so that even "temporary" *en masse* nationalisations are possible.[13] Fiscal rules setting ceilings on deficits and debts have been set aside for an indefinite period of time.[14]

However, it is one thing to allow states to intervene, and quite another to create the conditions under which they can do so with similar effect and resolve. Unleashing the financial power of states without taking note of the unevenness of fiscal capacity runs the risk of accelerating divergence within the EU, and especially within the eurozone. This is so for two related reasons. The impact of the pandemic is and may remain highly asymmetric. In economic and social terms, worst hit are the countries with large tourism, transport and retail service sectors, and in which remote work is less feasible. In addition, previous levels of debt lead to very different conditions of access to credit, which in eurozone orthodoxy should be obtained in financial markets and under "market conditions".[15]

Moreover, if the pandemic were to last longer than analysts expect (a far from improbable scenario), all states, and not only those in the eurozone periphery, may end up with serious difficulties in financing their public debt. In the middle of a deep recession, member states may struggle to find buyers for new debt to the value of 10 % of their GDP, in addition to the amount required to roll over debt reaching maturity.

Barely a few weeks before the GFCC rendered its judgment in *Weiss*, the ECB stepped in. After initial hesitation, it not only expanded its second round of quantitative easing by more than 300 billion euros, it also announced the so-called Pandemic Emergency Purchase Programme (PEPP), an extraordinary plan initially worth 750 billion euros (increased by 600 billion euros a month after the

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[12] See ECJ's case C-62/14, *Gauweiler and Others*, EU:C:2015:400; and BVerfG, Judgment of the Second Senate of 21 June 2016 - 2 BvR 2728/13.

[13] Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, C(2020) 1863 final.

[14] Statement of EU ministers of finance on the Stability and Growth Pact in light of the COVID-19 crisis, available at <https://www.consilium.europa.eu/en/press/press-releases/2020/03/23/statement-of-eu-ministersof-finance-on-the-stability-and-growth-pact-in-light-of-the-covid-19-crisis/>.

[15] *Gauweiler*, above n 12, para 100, 103 and 108.

GFCC ruling in *Weiss*, and by a further 500bn on December 2020).[16] In contrast to quantitative easing measures (QE), of which PSPP is an example, PEPP sets no ceiling on the purchase of public debt per issuer, and acquisitions do not have to be made in strict proportion to the percentage in which states participate in the capital of the ECB (the so-called "capital key"). This allows for greater flexibility. It is calculated that since the launch of PEPP, the ECB has acquired close to 70% of the public debt issued by Member States.[17] And yet, compared to programs adopted by other central banks, it remains restricted in the sense that direct monetary financing is (at least theoretically) still out of bounds. This reflects the legal limitations of the EMU framework, with the ECB already acting at the very limits of its powers, and probably beyond them – PEPP likely violates Article 123 TFEU, as inferred from the GFCC ruling in *Weiss*.[18]

3. Central banking: the changing role of the ECB

These latest developments invite a reflection on the changing role of central banking, a key aspect underlying the *Weiss* saga. In the context of the original design of EMU, the radical independence of the ECB was the institutional embodiment of the project of a politically neutral common currency, which had as a necessary corollary a clear-cut distinction between the spheres of economic and monetary policy. More than a decade into the manifold European crisis, however, the independence and the neutrality of the ECB have proved illusory. The functional need to avoid the disorganised unravelling of the Eurozone has led to a gradual and problematic mutation of the role of the ECB.

The powers of the ECB are clearly set out in the Treaties. The ECB is designed to be a fully independent central bank, sheltered from any form of political interference (Article 130 TFEU), with full and exclusive competence over the monetary policy of the Eurozone (Articles 3, 127-128 TFEU). As stressed by the GFCC, the legitimacy of such an arrangement is supposed to rest on the technocratic character of the ECB, which justifies an exception to the general rule of the democratic legitimation of public power. In this allegedly narrow domain, epistocracy trumps democracy. The ECB is expected to exercise its mandate in a clearly defined and restricted sphere on the grounds of cumulated technical knowledge in the conduct of monetary policy. As a result, drawing a clear line between monetary and economic issues is of the utmost importance, so as to guarantee that economic issues remain firmly in the hands of democratically legitimated bodies.[19] The outcome, as is well known, is an idiosyncratic form of economic and monetary union, partly inspired by postwar German arrangements,

[16] Decision (EU) 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17) OJ L 91, 25.3.2020, p. 1–4. This was expanded on 4 June 2020 and 10 December 2020.
[17] M. Buti and M. Messori 'Implementing the Recovery and Resilience Plans: the case of Italy', School of European Political Economy Luiss, November 2020, available at <https://tinyurl.com/peppluiss>.
[18] Para 201 to 204 and 211 of the *Weiss* ruling of the GFCC, above, n.1.
[19] See e.g. Kathleen MacNamara, 'The Forgotten Problem of Embeddedness: History Lessons for the Euro' in in Matthias Matthijs and Mark Blyth (eds) *The Future of the Euro* (Oxford University Press, 2015) 21 – 44.

at the very same time that the key institutional actor, the ECB, in contrast to its German twin, is disconnected from the political, economic and cultural contexts in which economic policy is conducted.

The viability of this layout assumed a limited central bank.[20] In the specific context in which the EMU was designed,[21] "monetarists" carried the day in affirming that the only meaningful task left to central banks was to fight inflation, as the *Bundesbank* had done since 1974 and the US Federal Reserve since 1979. Despite the rather mixed record of this vision when it was implemented in the first half of the 1980s (not least in Lawson's Britain),[22] it was boosted by the collapse of the Soviet bloc and by German reunification, precisely at the moment EMU's design was determined.[23] The negative consequences that a deflationary monetary policy could have for full employment and the distribution of income and wealth were fully set aside, resulting in implicit but fundamental redistributive choices.

While the peculiar construction of EMU appeared to thrive for a decade,[24] the "modest" ECB became a much more ambitious institution when the financial and fiscal seas turned rough. With financial markets in free fall, the ECB, like other major central banks, became the lender of last resort of private financial institutions through massive refinancing operations, turning it into a "market-maker". When the pile of cross-border debt that had been accumulated in the first decade of EMU threatened to collapse, the ECB played a major if not exclusive role as the lender of last resort for sovereign states, later expanded through the European version of quantitative easing, which ultimately led to PSPP. These were not, however, to be merely exceptional interventions. They have become regular powers of the ECB after their decade-long exercise. The fact that a capitalist economy moves from one imbalance to the next renders

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[20] This is reflected not only in the ECB's mandate as enshrined in the Treaties (first and foremost, to ensure price stability, and only then to support general economic policy), but also in the monetary rule which the ECB itself has articulated, setting as its target the growth of consumer prices at around 2% (Governing Council of the ECB, *A stability-oriented monetary policy strategy for the ESCB*, 13 October 1998, available at <https://www.ecb.europa.eu/press/pr/date/1998/html/pr981013_1.en.html>.; Governing Council of the ECB, *The ECB's Monetary Policy Strategy*, 8 May 2003, https://www.ecb.europa.eu/press/pr/date/2003/html/pr030508_2.en.html)

[21] Briefly sketched in part 2, section i), above.

[22] David Smith, *The Rise and Fall of Monetarism* (Penguin 1991).

[23] Ellie Cohen, 'The Euro, Economic Federalism, and National Sovereignty' in A. Pagden (ed.) *The Idea of Europe* (Cambridge University Press, 2002). Cf. Harold James, *Making the European Monetary Union* (Harvard University Press, 2012) 211 – 216.

[24] Massive cross-border financial flows compensated for the structural imbalances between the eurozone core and the eurozone periphery, permitting a precarious and contingent macroeconomic stability, as well as a catching-up process in terms of disposable income. In such circumstances, the ECB had a relatively easy task in keeping consumer prices around 2% in aggregate terms, not only formally complying with its mandate, but apparently demonstrating the virtues of its design. We now know, however, that underneath this comforting exterior, the picture was more mixed. Not only was price stability seriously compromised by skyrocketing asset prices, but even consumer price differentials within the eurozone were slowly but steadily creating a massive structural divergence between core and periphery, accelerated by wage repression in Germany. See e.g. Bob Jessop, 'Variegated Capitalism, *das Modell Deutschland*, and the Eurozone Crisis' (2014) 22:3 *Journal of Contemporary European Studies*, 248-260.

unavoidable a key stabilising role for monetary policy, which turns the whole distinction between economic and monetary policy into an exercise in scholastic obfuscation.[25] But without such a distinction, the coherence of the Maastricht design breaks down.

This mutation of the role of the central bank is far from exclusive to Europe.[26] All major central banks have assumed more expansive powers through the recent crises. What renders the European case politically and constitutionally explosive is the power of the myth of central bank independence,[27] reflected in the TFEU and domestic constitutions. This myth persists, with the Maastricht rules entrenched beyond the reach of the ordinary political process and politically buttressed by ordoliberals and rent-seekers of the ordoliberal institutional design.[28]

When the ECJ confronted the new realities of central banking in *Gauweiler*, it chose to treat the OMT programme as exceptional. It devised a test premised on assumptions about the 'normal' role and function of the central bank in 'normal' economic conditions: ensure the singleness of the monetary policy and the preservation of the monetary policy transmission mechanism. In markets characterised by 'excessive' risk premia, not justified by macro-economic differences, promising to buy sovereign debt on secondary markets was held to be necessary and proportionate to the extent that it would return markets to a rational equilibrium, where risk would be priced 'correctly'.[29] The markets could then exercise their disciplinary power on Member States, unconstrained by a programme that had been carefully crafted to avoid imperilling that power, and the Bank could go back to its day job of transmitting undistorted 'impulses' rather than bloating up its balance sheet.[30] This, of course, was not to be.

Yet in *Weiss*, the ECJ turned crisis law into the new normal, repeating the reasoning fashioned for the exception as if it were perfectly suitable for the norm. At stake was no longer the need to repair disrupted transmission mechanisms, that prevented the ECB from ensuring price stability, but the need to enhance the monetary policy's transmission potential to the real economy with a view to averting deflation. The same loose strictures that had enabled the Court to preserve the validity of an emergency measure, announced at the height of the Eurozone crisis and intended to secure a return to the 'normal', applied now, in the new normal, when the ECB consolidated an unprecedented level of economic intervention in its successive attempts to return inflation to its desirable level.

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[25] Pierluigi Ciocca, *L'instabilità dell'economia. Prospettive di analisi storica*, Torino: Einaudi, 1987; *La banca che ci manca. Le banche centrali, l'Europa, l'instabilità del capitalismo,* Roma: Donzelli, 2015.

[26] Adam Tooze, 'The Death of the Central Bank Myth', *Foreign Policy*, May 13 2020.

[27] Cf. Jeremy Leaman, *The Bundesbank myth: towards a critique of central bank independence* (Palgrave Macmillan, 2001), 222-229. On the ideological origins of the myth, see also his 'Central banking and the crisis of social democracy - a comparative analysis of British and German views', (1995) 4:3 *German Politics*, 22-48.

[28] See Arnaud Lechevalier, 'Why and How Has German Ordoliberalism Become a French Issue? Some Aspects about Ordoliberal Thoughts we can Learn from the French Reception' in Joseph Hien and Christian Joerges (eds) *Ordoliberalism, Law and The Rule of Economics* (Hart Publishing, 2017) 24 – 48.

[29] *Gauweiler*, above n 12, para 72-73, 76-78.

[30] *Gauweiler*, above n 12, para 82, 85-90.

Crisis or no crisis, we were told that "nothing more" must be required from the ECB than the careful and accurate deployment of its expertise.[31]

This comes with a serious consequence. Commitment to the cause of European integration has blinded the ECJ to the democratic void that has emerged in European economic and monetary governance. It might not be the institutional role of the ECJ to correct fundamental democratic design flaws, but the step it took from crisis law to a new normal, by a questionable use of legal tools of review, further entrenched that void. The GFCC, in response, although insisting on the principle of democratic legitimacy, can only offer the pretense that a return to the Maastricht criteria would remedy the democratic defects.[32] The GFCC's hybrid neoliberal and ordoliberal worldview, conveyed by the litigants and the claims they brought to Court, alerted it to the perils of an unlimited expansion of the ECB's powers. But it remained blind to the preconditions of a stable and symmetrical monetary union: a democratically responsive and redistributive supranational government.

The ECB's 'independence' from political influence and its single mandate of 'price stability' reflect the obsessions of a previous era. Even – or especially – after 2007, Member States were willing to sacrifice investment if that required breaching fiscal rules, and what is left of organised labour utterly failed to exert any upward pressure on wages.[33] The mantra of 'sound public finances' has now transformed into Member States' inability, or unwillingness, to conduct any meaningful economic policy at all. Rather than fighting to keep inflation down at 2%, the ECB is struggling to combat deflation. This inversion, however, has occurred without any concurrent political, legal or constitutional change. Indeed, the most relevant adaptation to the new reality is likely to come from the relative obscurity of the ECB's monetary policy strategy review announced for the summer of 2021. Presented as an exercise 'within the framework of the mandate of price stability,' the review is bound to show just how far the Bank is compelled – and prepared – to push the limits of the concept. President Lagarde has already made clear that 'unconventional' policies are here to stay, and that the consequent, intensified interaction between monetary and fiscal policies raises questions including 'how to set policy in a world of possibly permanently higher levels of public debt, and the appropriate design of Europe's fiscal framework.'[34] Tellingly, no acknowledgment is made of the political and democratic implications of such redesign.

4. The *Weiss* judgments: eluding and maintaining an outdated Treaty framework

[31] *Gauweiler*, above n 12, para 75; *Weiss*, above n 1, para 91.
[32] On the use of the principle of democracy in this judgment, see Isabel Feichtner, 'The German Constitutional Court's PSPP Judgment: Impediment and Impetus for the Democratisation of Europe', *German Law Journal* (2020) 21, 1090-1103.
[33] See Andreas Bieler et al. 'EU Aggregate Demand As a Way out of Crisis? Engaging the Post-Keynesian Critique' *Journal of Common Market Studies* (2019) 57:4, 805–822
[34] Christine Lagarde, 'The monetary policy strategy review: some preliminary considerations', Speech at the 'ECB and its watchers XXI' conference, 30 September 2020, available at <https://www.ecb.europa.eu/press/key/date/2020/html/ecb.sp200930~169abb1202.en.html>.

By now it may be clear to the reader that the transformation of the ECB into the powerful institution that it is today is more complex than a simple power-grab.[35] While the *Weiss* saga demonstrated the continuing legal significance of its mandate, there is little doubt that the Bank has gradually re-interpreted its boundaries. The ECB has determined its own competence, as the GFCC puts it, and thereby imperilled the European order of competences. Yet, contrary to Karlsruhe's ruling, this is not the consequence merely of a lack of judicial oversight. Judicial scrutiny alone cannot remedy it. The clash between the two courts thus has the merit of highlighting the limits of law, and in particular, of the principle of proportionality, with both courts employing it as a means to disguise their policy preferences.

The ECJ's delimitation of the scope of monetary policy by reference to the objectives pursued and the effectiveness of monetary action conceals the fact that monetary and economic policy are intertwined in a way that defies the neat lines drawn in the Treaty. It allows the ECB to stretch the monetary justification for its programmes beyond the limits envisaged at Maastricht, and virtually collapses the distinction that the ECJ only apparently upheld.[36] As the main pillar of the EMU's institutional structure crumbles, the Luxembourg Court continues to insist on a distinction that reality elides.

The GFCC used proportionality as a tool to determine a suitable balance between monetary policy objectives and economic policy effects (a matter that, purportedly, a court can ascertain, even if this Court applied proportionality in a way that is formally contrary to Article 5 (4) TEU).[37] The principle of proportionality enabled the GFCC to engage in *ultra vires* review on the assumption that it can ensure that ECB's discretion is contained within proper limits. Compliance can and should then be subject to strict judicial scrutiny. Yet the actual consequences of its judgment confirm that this is largely an illusion, at least as long as the ECB remains, at crucial points, the only institution capable of securing macro-economic stability, and regarded as such by the European Council (particularly in a context characterised by political blockages that eliminate any alternative or complementary course of action).[38]

The dispute about proportionality shows its malleability. Having settled the issue of the existence of competence by reference to the objectives of monetary policy, the ECJ could deploy proportionality in a relatively innocuous way. It could largely disregard the economic policy effects of QE because, given its premise, these were not part of the ends against which the means should be tested, not even as secondary purposes.[39] Its standard of review was not only

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[35] See Hjalte Lokdam, "We Serve the People of Europe': Reimagining the ECB's Political Master in the Wake of Its Emergency Politics," *JCMS: Journal of Common Market Studies* (2020) 58:4, 978–98.

[36] Even while stressing that it was never meant to be absolute (*Weiss*, above n 37, para 60).

[37] The GFCC uses the principle to establish the *existence*, rather than the *exercise* of competence (see para 127 - "the specific manner in which the CJEU applies the principle of proportionality in the case at hand renders that principle meaningless *for the purposes of distinguishing,* in relation to the PSPP, between monetary policy and economic policy", emphasis added – para 139 and 165).

[38] Deborah Mabbett and Waltraud Schelkle, 'Independent or Lonely? Central Banking in Crisis' *Review of International Political Economy* (2019) 26:3, pp. 436-460, pp. 453-455.

[39] Except to the extent that the GFCC considered the risk of losses (para 94 – 99).

limited to manifest errors or disproportionality; it was premised on an outright deferral to the economic expertise of the ECB, which was presumed to be unblemished by policy considerations in the exercise of its mandate.[40] The reference to the duty of care within the Court's proportionality assessment is telling in this regard. This is less a duty of compliance which the Court will review to counterbalance wide discretion,[41] than a duty the ECB is presumed to comply with when adopting controversial monetary policy measures. The ECJ's use of proportionality as a free-standing ground of judicial review, that is, without clarifying the opposing interests to balance, essentially mimics the ECB's own proportionality assessment (as the GFCC pointed out).[42] The suitability and necessity of the programme are assessed in the programme's own terms, by reference to its stated objectives, not by balancing the aim pursued against unidentified (non-existent?) interests in need of legal protection. Far from constituting a legal constraint on the adoption of measures, 'the purported monetary policy objective is possibly only invoked to disguise what essentially constitutes an economic and fiscal policy agenda'.[43] An impolite but accurate translation in plain English is that the ECJ was merely pretending to engage in proportionality review, when the positive outcome was predetermined from the outset, independently of the circumstances.[44]

In its critique of the ECJ, the GFCC paradoxically clarified the futility of proportionality as a means of tying the ECB's actions to its mandate. The GFCC presumed that a proper application of proportionality could police the limits of monetary policy and its socio-economic distributional effects. According to the GFCC, the court's role is to require the ECB to demonstrate it has weighed and justified the foreseeable and knowingly accepted economic consequences of its programme against its monetary policy objectives.[45] While one should indeed require the ECB to justify its actions plainly and openly, competence, in the GFCC's line of reasoning, becomes a matter of determining when the economic effect of an instrument outweighs its monetary purpose. In other words, competence is a matter of degree.[46] At what point is the limited mandate breached? At what point are economic implications no longer secondary, but

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[40] Above n 1, ruling of the ECJ ("nothing more can be required" apart from a careful and accurate deployment of its "economic expertise and the necessary technical means at its disposal").
[41] As in the paradigmatic Case C-269/90, *Technische Universität München v Hauptzollamt München-Mitte*, EU:C:1991:438, para 14, invoked in *Weiss*, above n 37, para 30 (and in *Gauweiler*, above n 12, para 69).
[42] Decision 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (OJ L 121, 14.5.2015), recitals 4 and 5. See, also, GCC, para 132; Vassiliki Kosta, 'The Principle of Proportionality in EU Law: An Interest-Based Taxonomy' in Joana Mendes (ed.), *EU Executive Discretion and the Limits of Law* (Oxford University Press, 2019), 198-219, at 213-219 (available at https://ssrn.com/abstract=3368867).
[43] Above n 1, ruling of the GFCC, para 137.
[44] Cf. Leone Niglia, 'Eclipse of the Constitution {*Europe Nouveau Siècle*}', (2016) 22 :2 *European Law Journal*, 132-56. Also Kosta, above n. 42, 218-219.
[45] Above n 1 (ruling of the GFCC), para 173, 176 and 179.
[46] In a similar sense, but pointing the problems this poses in view of Article 5(1) and (4) TEU and the pre-emptive effect of exclusive competence, see Matthias Wendel, "Paradoxes of Ultra-vires Review: A Critical Review of the PSPP Decision and Its Initial Reception", *German Law Journal* (2020) 21, pp. 979-994, 986.

primary objectives? Even presuming that such an exercise could be objectively assessed, the answer does not lie in the law.

The GFCC lays bare the fuzziness of the boundary between monetary and economic matters. Although attempting to squeeze the ECB back into its narrow Treaty mandate of price stability, in reality it demonstrates the difficulties of a distinction that rests on a legal fiction: the fiction that the conduct of monetary policy can be detached from economic policy, and insulated from political interference. As we have already argued, the triumph of this idea is the product of a specific politico-economic context and a historically contingent institutional setting.[47]

Between the empowerment of the ECB through a full-blown deferral to its technical expertise, on the one hand, and the formally strict (and inward-looking) approach to proportionality, on the other, *both* courts avoid the fundamental issue: the ECB's mandate has changed because, having been designed to fight inflation (and inflation only), it is now fighting deflation. And, in crucial moments, it was the only institution capable of intervening to avoid the uncontrolled unravelling of the Eurozone, first during the fiscal crisis in September 2012, then after the COVID-19 pandemic in March 2020. The European 'catch-22', quite obviously, is that the ECB's original mandate does not support such intervention, and were it to be amended to do so, it would be impossible to reconcile with a depoliticised central bank.

What we are left with is a fundamental problem of democratic accountability. The ECB is now free to do "whatever it takes" no longer only in exceptional situations (duly emphasised by AG Cruz Villalón in his *Gauweiler* opinion but absent in the *Weiss* ruling of the ECJ), but as long as it can demonstrate to judicial satisfaction that it has conducted a sound proportionality analysis. In the meanwhile, independence is unmoored from the democratic foundation of a limited Treaty mandate,[48] and the ability of governments and parliaments of Member States to pursue economic policy is significantly restricted.

Ultimately, the dispute in *Weiss* became a matter of the detail of the justification given by the ECB. Yet, what is at stake is far from a matter of detail. If courts cannot police the boundaries of the mandate of an independent central bank – and it is our contention that the *Weiss* saga shows that they cannot – there is more at stake than a problem of the rule of law. The question of how to fashion programmes of monetary and economic intervention in a democratic and effective way – ever more pressing – is obfuscated by the judicial dispute. The GFCC clearly unveiled (willingly or not) the legal and democratic defects of the current construction. Yet the political "all-or-nothing" discourse in support of integration hinders the consideration of alternatives to the existing structures.[49]

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[47] Leaman, above, n. 27; and Simon Mee, *Central Bank Independence and the Legacy of the German Past* (Cambridge University Press, 2019), 1-28.

[48] On the limits of this justification, Leaman (above, n.27, 2001), 253-257.

[49] Joseph H.H. Weiler, 'Integration Through Fear', 23 *European Journal of International Law* (2012) 1, 1–5; Michael A. Wilkinson 'The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union' (2013) 14:5 *German Law Journal* 527 – 560; Nicole Scicluna, *European Union Constitutionalism in Crisis* (Routledge, 2015), 130.

Independence of the ECB is revealed not so much as a positive choice, but as a formula of convenience deployed to *avoid* having to make fundamental democratic choices.

5. A missed opportunity for constitutional transformation

Awareness of the high stakes involved in the case could have inspired an entirely different approach by *both* courts. If there ever was a case in which it made sense to apply something akin to the political question doctrine, it was in *Weiss.*[50] Had the ECJ and the GFCC done so, they would have put a halt to the judicialisation of quantitative easing, not to mention to the endless discussions about authority and proportionality.

Nevertheless, in the decision to adjudicate the merits of the cases there seemed to be a silver lining. Even the harshest critics of its timing, logic and tone could acknowledge the potential of the *Weiss* ruling of the GFCC to force the European Union to face some fundamental and even existential issues. From an optimistic perspective, *Weiss* could be the ruling to focus minds on the need for Treaty reform (and domestic constitutional reform): either to create a robust fiscal centre and a paradigm change in European central banking, or to pursue a coordinated dismantling of the monetary union through the formation of a looser structure. Until now this opportunity has been missed; the avoidance of democratic choices continues unabated. The result is more of the same fudge seen in previous crises, the same dysfunctional recipe of creative monetary policy, financial assistance and conditionality, and seemingly endless litigation.

To appreciate the opportunity offered by *Weiss,* a comparison with more remote developments in constitutional history, when judicial resistance did trigger a momentous constitutional transformation, is instructive. In particular, the shift from *laissez-faire* to activist constitutionalism during the New Deal offers an interesting parallel.[51]

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[50] Along the arguments advanced by Justice Lübbe-Wolff in her dissenting opinion in *Gauweiler,* above n. 12.

[51] The analogy between current European developments and the New Deal period is more general but cannot be fully explored. Consider, for instance, the 'gold clause' cases, or for that matter, Roosevelt's fundamental monetary decision of April 1933 to go off the gold standard. The immediate purpose of going off gold was to lighten the burden of the Great Depression on farmers, especially by generating inflation, raising commodity prices and effectively lowering mortgage payments. Whatever the wisdom of the policy, it was clearly going to be fatally defeated if the 'gold clauses', ubiquitous in loan and bond contracts, both public and private, were upheld. For this reason, Congress passed Joint Resolution No. 10, declaring all gold clauses contrary to public policy and void. As a result, up to four 'gold clause' cases ended up before the Supreme Court. The stakes could not have been greater, nor could they have a more familiar ring. Financial markets, both in the US and around the world, awaited the decisions with trepidation. Waves of bankruptcies and bank collapses were expected to follow negative rulings. At the same time, unease was widespread in certain circles about the rather obvious distributive effects of the measures among creditors and debtors. As a result, the pressure on the Court was enormous. The options available to the justices resonate today: at the extremes, they could either take President Roosevelt's word for it and accept that war-like emergency powers were called for by the force of circumstance (as argued by Arthur Nussbaum, 'Comparative and International Aspects of American Gold Clause Abrogation', (1934) 44 *Yale Law Journal* 53-89, 59-60), or uphold the contract and property rights central to the common law constitutionalism of the *Lochner*-era and

Judicial resistance to the most meaningful legislative acts adopted in the 'first New Deal' (the National Industrial Recovery Act and the Agricultural Adjustment Act, both of 1933) was, if we follow Bruce Ackerman's famous account, not an aberration by recalcitrant conservative judges, but a principled challenge to a rising movement of transformative reform, which led to signalling that the New Deal entailed a profound modification in the constitutional system.[52] By striking down measures that replaced market capitalism with a corporatist structure under presidential leadership, the Supreme Court made, whatever the intention of the individual justices, a positive contribution to the quality of the ongoing constitutional debate.[53] Particularly after the two unanimous judgments in *Schechter*[54] and *Radford,*[55] Roosevelt was forced into a drastic choice between a return to a Hoover-style of government or a political struggle for constitutional change. Roosevelt discarded the possibility of formal constitutional amendment as too politically risky.[56] Constitutional change was instead pursued informally by means of a more refined and yet no less radical package of legislative reforms (the so-called 'second New Deal') and the notorious court-packing plan.[57]

The outcome of this story is well-known: faced with a hugely popular Presidential administration after the 1936 elections and the more tangible prospect of hostile judicial reform, the Court operated a judicial switch,[58] which killed off the debate on the political economy of the constitution and enabled its unconventional adaptation to active government intervention.[59]

Weiss could indeed have been the starting point for a similar trajectory. Of course, the main actors in this European saga were quite different from the American antecedent: the focal point of constitutional resistance was not a federal but a national court, and the main policy actor on the ground was a technocratic body rather than a president with broad popular support. These are no small differences and the outcome of the story will reflect them to a great extent.

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condemn the federal government's efforts at economic engineering. In its 1935 rulings, the Court did neither. On the validity of gold clauses in private contracts, it boldly upheld the power of Congress to conduct 'monetary policy' over the sanctity of contract and property rights limited to a proportionality test of sorts. Cf. *Norman v Baltimore*, 294 US 240, 310 (1935) and the detailed account offered in Sebastian Edwards, *American Default- The Untold Story of FDR, the Supreme Court and the Battle over Gold* (Princeton University Press, 2018).

[52] Bruce Ackerman, *We the people. Transformations* (Harvard University Press, 1998), 291.

[53] *Id.,* 303-305 and 312.

[54] *A. L. A. Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935).

[55] *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

[56] Ackerman, above n 52**Error! Bookmark not defined.**, 326-328.

[57] *Id.,* 301-302 and 317-319.

[58] *Id.,* 332 and 342-343. The turning point is commonly identified in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). The 'switch' may have had rather more nuanced drivers than merely elections and court-packing. See Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (Oxford University Press, 1998).

[59]*Id.*, 384. This constitutional change was then memorialized in *United States v. Carolene Products Company*, 304 U.S. 144 (1938) and *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941).

But the analogies between the two sagas are instructive. First, both take place against the backdrop of outdated constitutional frameworks whose rigorous enforcement prevents the adoption of policy-measures successfully experimented with elsewhere. Secondly, both cases involve courts that are not afraid to defy the mounting policy consensus. Thirdly, in both cases, policy-makers are confronted with the same dilemma between reverting to the previous course of action or progressing towards a more advanced policy agenda.

With this in mind, the *Weiss* saga can be reviewed on the basis of the political dynamics triggered by *Schechter* and *Radford. Weiss* was decided in an ideological context that, like the *laissez-faire* constitutionalism of the mid-1930s, had already revealed its shortcomings. That was clear at least since *Gauweiler*. In that case, the GFCC criticised proportionality review by the ECJ and subjected the *Bundesbank*'s participation in the ECB programme to strict conditions. Subsequent to *Gauweiler*, the ECB's QE programmes, however, challenged the conditions set out by the ECJ and the GFCC, in a rather clear attempt to move to a functional paradigm entailing a broader mandate and a focus on fighting deflation and economic stagnation.[60] *Weiss*, in opposing this development, signalled that such a transition requires Treaty revision, at the very least.[61]

After *Weiss*, European political and technocratic elites, like the Roosevelt administration after *Schechter* and *Radford*, were forced into a decision between competing strategies. There were essentially three options. First, EU policy-makers could bow to the GFCC and retreat to a more orthodox interpretation of the Treaties. They could abandon the QE programmes, and replace them with the usual mix of financial assistance and conditionality administered to countries in financial pain during the euro crisis. By attempting to push EU institutions in this direction, *Weiss* revealed a high degree of political awareness on the side of German constitutional judges, because it strengthened the minority position of the *Bundesbank* within the Governing Council of the ECB and favoured the preferred outcome of many Northern and Eastern European governments since the beginning of the COVID-19 crisis. At the same time, that response to the ruling would have dramatically increased the chances of an implosion of the Eurozone, as any measures of fresh austerity imposed upon peripheral States in the midst of the pandemic would literally be explosive.

The second option was treaty amendment in the direction of either the reform of EMU or its co-ordinated dissolution. As in 1936 America, in 2020 Europe, this, on paper, was the most appropriate response. In in the world of pragmatic politics the appetite for it was small.[62] Moreover none of the EU policy-makers could vaunt a degree of political support comparable to that enabling Roosevelt's unconventional constitutional change. But without such a transformative response, the basic structural problems would remain.

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[60] Tooze, above n 26.

[61] Opposition is expressed in the strongest form by the GCC, but the ECJ, with its interpretation of article 123 TFEU, also seems on the same page.

[62] In retrospect, some Americans may regret Roosevelt's reluctance to pursue constitutional amendment despite his huge popularity. See Bruce Ackerman, Revolutionary Constitutions: Charismatic Leadership and the Rule of Law, Harvard University Press, 2019, 395.

The third option was for the EU institutions to respond to *Weiss* in managerial terms with a view to preserving rather than transforming the precarious system constructed by the existing treaty framework. This option of muddling through was always the most likely to prevail.

6. Can the democratic and social constitution survive another decade of muddling through?

The most cool-headed policy reaction to *Weiss* was that of the ECB, which decided to disregard the ruling on the correct assumption that state courts cannot bind federal authorities and that its programme was valid for EU purposes.[63] Policy decisions followed consistently from this premise: as mentioned above,[64] not only were QE programmes retained, but they were later expanded to cope with a crisis that in the meantime had worsened. This course of action made economic sense, but it again exposed the gap between the law in the books and the law in action. To be sure, this reaction recalled Roosevelt's decision to push forward with the 'second New Deal' in the aftermath of *Schechter* and *Radford*. But while with that plan Roosevelt was openly challenging the Supreme Court and its economic and political constituency, the ECB did not seem similarly motivated. Nothing in its actions and declarations after *Weiss* seems to suggest a constitutional moment. The ECB was, again, buying time.[65]

Exceptionalism and the preservation of the status quo were also the prevailing features of *Next Generation EU* (hereafter: NGEU), the wide-ranging package of EU fiscal measures announced by the European Council as a response to the Covid-19 pandemic.[66] To be sure, compared with the ECB reaction, the linkage between this initiative and *Weiss* is far from direct and explicit.[67] From a political economy perspective, however, NGEU is part of the picture. It is a move to reduce excessive emphasis on monetary policy and to shift part of the burden to the EU budget. Yet, this plan only gestures towards the necessary constitutional transformation and, although containing elements of institutional innovation, it remains a fudge to muddle through under the existing Treaty framework.

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[63] ECB takes note of German Federal Constitutional Court ruling and remains fully committed to its mandate, press release, 5 May 2020, available at <https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200505~00a09107a9.en.html>.

[64] See above section 2, iii).

[65] Cf. Wolfgang Streeck, *Buying Time*, (Verso, 2015).

[66] European Council Conclusions, 17-21 July 2020, available at <https://www.consilium.europa.eu/media/45109/210720-euco-final-conclusions-en.pdf>.

[67] European Council Conclusions, 17-21 July 2020, available at <https://www.consilium.europa.eu/media/45109/210720-euco-final-conclusions-en.pdf>. The establishment of a Recovery Fund had already been planned before *Weiss* at the Eurogroup meeting of 9 April 2020, see Report on the comprehensive economic policy response to the COVID-19 pandemic, available at <https://www.consilium.europa.eu/en/press/press-releases/2020/04/09/report-on-the-comprehensive-economic-policy-response-to-the-covid-19-pandemic/>.

The innovative part of NGEU is not insignificant: the programme includes a *Recovery and Resilience Facility* (Recovery Fund) that commits the Union to unprecedented levels of joint indebtedness.[68] It is not the Hamiltonian moment craved by many professed federalists, but it is a move in that direction: more substantial than current structural and cohesion funds, the Recovery Fund introduces a meaningful instrument of transnational solidarity, entailing the transfer of sizeable resources in the forms of grants and loans to the countries worst affected by the COVID-19 pandemic. At the moment of writing, many crucial aspects of the programme are still being settled.[69]

Even at this stage, however, two elements signal that NGEU is unlikely to amount to a constitutional transformation. For one, the Recovery Fund is an exceptional programme conceived in strict relation to the COVID-19 pandemic. Of course, it will keep European institutions busy for the next three to five years and there are already many claiming that *ce n'est qu'un debut*. Our assessment is more cautious: the instrument may turn out to be the embryo of a more permanent and sizeable fiscal capacity of the Union. Yet, for the time being, it rests on a precarious political consensus which would disappear were the NGEU to be presented as the harbinger of a more consolidated fiscal Union. It is not a mere detail that the package includes a marked reduction of the permanent EU budget, which will decline in real terms once the extraordinary expenditure made on recovery is over.

Secondly, and most importantly, although the Recovery Fund provides non-repayable money to finance *recovery and resilience plans* in worst hit countries,[70] this money comes with considerable conditions: beneficiary countries will not simply be asked to comply with the terms of the approved plans, but they are also expected to implement the country-specific recommendations defined by the European Commission and the Council within the European Semester.[71] In other words, the Recovery Fund is not simply a financial transfer to fund national projects with an EU imprimatur; it is the carrot for a cocktail of structural reforms which may end up proving very similar to those implemented in southern Europe over the last decade. Thus, the institutional architecture emerging for the recovery from the COVID-19 crisis points decisively to an increased managerial effort on the part of the Union to harness national policy-making. At some point the currently suspended Stability and Growth Pact will be reactivated, with the consequence that many of the Member States will be subject to an excessive deficit procedure (article 126 TFEU). The constraints on national budgets may well be strict and for many countries the Recovery Fund may become the main or even the only available source of funding for public investments. Considering the record of the previous

[68] See European Council Conclusions, 17-21 July 2020, note above, A14.

[69] The Council and the Parliament reached a provisional agreement on the Commission's proposal in December 2020 (https://www.consilium.europa.eu/en/press/press-releases/2020/12/18/recovery-and-resilience-facility-council-presidency-and-parliament-reach-provisional-agreement/)

[70] *Id.,* A18.

[71] *Id.,* A19.

experiments with austerity, the political economy of the operation is dubious to say the least.[72]

But even if the Union were to pursue a more benign and far-sighted economic policy, its overall democratic cost would be enormous, as national budgetary policies would be almost entirely pre-empted by the combination of the Recovery Fund and the Stability and Growth Pact constraints. A democratic black hole would emerge. In other words, exceptionalism and the preservation of the status quo remain the prevailing features of the response.

This outcome is perhaps all that can realistically be expected in the current circumstances of European politics. Had there been a set of political parties seriously committed to the completion of EMU, *Weiss* might have been the trigger for a 'revolutionary reform'. But no meaningful political force with such a political agenda is in sight and, tellingly, neither has the judgment of the GFCC openly challenging the authority of EU law contributed to its awakening. As a result, we are headed towards another uncertain decade of 'muddling through' and technocratic problem-solving.

Past experience has taught us that muddling through under the existing treaties works only at the expense of the democratic and social constitution. Past and present experience also shows the necessity of using macroeconomic instruments that are part of the social democratic tradition, and which EU rules constrain or foreclose.[73] If those are now required, there are only two ways to harness them: either by aligning the EMU to democratic and social ends or unravelling it in a coordinated fashion to restore democratic and social constitutionalism at the national level. At the moment both options seem devoid of sufficient political support, which leaves us with the unpleasant impression that, at the end of the day, the real loser from this affair will be the democratic and social constitution itself.

[72] See Statement by Professor Philip Alston, United Nations Special Rapporteur on extreme poverty and human rights, on his visit to Spain, 27 January-7 February 2020, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25524&LangID=E>.
[73] Interview with Christine Lagarde, President of the ECB, conducted by Marie Charrel and Eric Albert, *Le Monde*, 19 October 2020, available at <https://www.ecb.europa.eu/press/inter/date/2020/html/ecb.in201019~45f5cf8040.en.html>.